Supreme Court, U.S.
FILED
JUL 23 2007
OFFICE OF THE CLERK

No. 07-15

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
ROBERT M. LOEB
CATHERINE Y. HANCOCK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner may file a second, duplicative petition for a writ of certiorari before judgment, just three months after his previous petition was denied and while his appeal is still held in abeyance (at his request) by the court of appeals.

2. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas corpus petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

3. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

4. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

5. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*:
476 F.3d 981 (D.C. Cir. 2007) 6
127 S. Ct 1478 (2007) 8
Foretich v. *United States*, 351 F.3d 1198 (D.C. Cir. 2003) 14
Hamdan v. *Gates*, 127 S. Ct. 2133 (2007) 8, 13
Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) 2, 3, 4, 14
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 6, 7
Matthews v. *Diaz*, 426 U.S. 67 (1976) 15
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 15
Rasul v. *Bush*, 542 U.S. 466 (2004) 7
Selective Serv. Sys. v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) 15
United States v. *Lovett*, 328 U.S. 303 (1946) 14

Constitution, treaty, statutes and rule:

U.S. Const.:
Art. I, § 9:
Cl. 2 (Suspension Clause) 6, 7

Constitution, treaty, statutes and rule—Continued: Page

Cl. 3 (Bill of Attainder Clause) 13
Amend. V (Due Process Clause) 13, 15
Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 2
Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739:
§ 1005(e)(1), 119 Stat. 2742 3
§ 1005(e)(2), 119 Stat. 2742 ..... 3, 4
§ 1005(e)(2)(A), 119 Stat. 2742 3
§ 1005(e)(2)(C), 119 Stat. 2742 3
§ 1005(e)(3), 119 Stat. 2743 4
§ 1005(e)(3)(A), 119 Stat. 2743 3
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 4
§ 3, 120 Stat. 2600-2631 (to be codified at 10 U.S.C. ch. 47a (2006)) 4, 5
§ 4, 120 Stat. 2631 5
§ 7, 120 Stat. 2635-2636 ..... 14, 15
§ 7(a), 120 Stat. 2635 ..... 4, 6, 15
§ 7(a), 120 Stat. 2636 ..... 4, 11
§ 7(b), 120 Stat. 2636 ..... 4, 6
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 2
28 U.S.C. 2241 4
Sup. Ct. R. 11 ..... 9, 10

Miscellaneous: Page

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001) 2

Memorandum from Deputy Secretary of Defense Paul Wolfowitz, re: Order Establishing Combatant Status Review Tribunal (July 7, 2004) 2

In the Supreme Court of the United States

No. 07-15

SALIM AHMED HAMDAN, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-16a) is reported at 464 F. Supp. 2d 9.

JURISDICTION

This second and successive petition for a writ of certiorari before judgment was filed on July 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. Petitioner, a Yemeni national, was captured in Afghanistan in November 2001 and then transported to the Guantanamo Bay Naval Base in Cuba. Pet. App. 1a. At Guantanamo Bay, petitioner was given a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT), which determined that he is an enemy

combatant. Indeed, petitioner has admitted that he was a personal assistant to Osama bin Laden. For purposes of the CSRT, an enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006) (quoting Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004)).

In July 2003, acting pursuant to an executive order providing for the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States, see *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001), the President designated petitioner for trial before a military commission. See *Hamdan*, 126 S. Ct. at 2760. Petitioner was charged with a conspiracy to commit attacks on civilians and civilian objects, murder by an unprivileged belligerent, and terrorism. *Id.* at 2761. The charge was based on his direct connection as bodyguard and driver to Osama bin Laden, and his participation in al Qaeda's campaign of international terrorism against the United States, including transporting weapons for al Qaeda. *Ibid.*

2. Petitioner filed a petition for habeas corpus and/or mandamus, alleging in relevant part that the President lacks authority to try him before a military commission, rather than by a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and that the military-commission procedures violate the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T.

3316, 75 U.N.T.S. 135 (Geneva Convention). See *Hamdan*, 126 S. Ct. at 2759. The district court granted petitioner's habeas petition and stayed the military-commission proceedings. *Id.* at 2761. The court of appeals reversed, and this Court granted review. See *id.* at 2762.

3. While petitioner's case was pending in this Court, Congress enacted the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of the DTA amended the federal habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction" to consider habeas petitions filed by aliens detained at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742.

Section 1005(e)(2) of the DTA provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The DTA specifies that the court of appeals may determine whether a final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," and, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C), 119 Stat. 2742. Section 1005(e)(3) creates a parallel exclusive-review mechanism for Guantanamo Bay detainees seeking to challenge final criminal convictions issued by military commissions. § 1005(e)(3)(A), 119 Stat. 2743.

4. In June 2006, this Court held that Section 1005(e)(1) of the DTA does not apply to habeas claims

filed before the DTA was enacted. See *Hamdan*, 126 S. Ct. at 2762-2769. On the merits, the Court further held that the military commission convened to try petitioner for conspiring to violate the laws of war could not proceed because it was not authorized by Congress. See *id.* at 2772-2798.

5. In the wake of this Court's decision, Congress enacted the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. Section 7(a) of the MCA, 120 Stat. 2635, amends 28 U.S.C. 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Section 7(a) also removes federal court jurisdiction, except as provided by Section 1005(e)(2) and (3) of the DTA, over "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien. MCA § 7(a), 120 Stat. 2636. The MCA further provides that these amendments "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." § 7(b), 120 Stat. 2636.

The MCA also established a detailed regime governing the establishment and conduct of military commissions, creating within the Uniform Code of Military Justice a chapter on "Military Commissions." See MCA § 3,

120 Stat. 2600-2631 (to be codified at 10 U.S.C. ch. 47A (2006)). That chapter establishes requirements for military commissions distinct from and in the place of the UCMJ court-martial provisions. See § 4, 120 Stat. 2631 (amending various provisions of UCMJ pertaining to courts-martial to make clear that they do not apply to military commissions under the MCA).

6. On remand, the district court held that the MCA removes federal jurisdiction over petitioner's habeas case, and it dismissed his petition for lack of subject-matter jurisdiction. Pet. App. 1a-16a. The court held that the MCA was intended to remove statutory jurisdiction over habeas petitions filed by aliens detained as enemy combatants. *Id.* at 3a-5a. The court further held that Congress did not intend the MCA to suspend any constitutional right to the writ of habeas corpus, *id.* at 5a-11a, but concluded that petitioner, as an alien captured and detained outside the sovereign territory of the United States, has no constitutional rights under the Suspension Clause, *id.* at 11a-15a. Accordingly, the court concluded it was without jurisdiction and dismissed petitioner's habeas petition. *Id.* at 15a-16a.

Petitioner filed a notice of appeal from the district court's dismissal of his petition, Pet. App. 30a-31a, but moved to hold his appeal in abeyance pending the court of appeals' resolution of *Boumediene* v. *Bush*, No. 05-5062 (D.C. Cir.) and *Al Odah* v. *United States*, No. 05-5064 (D.C. Cir.). 07-5042 Mot. to Hold Appeal in Abeyance (D.C. Cir. filed Feb. 6, 2007). The court granted his motion. See 07-5042 Order (D.C. Cir. Mar. 22, 2007).

7. On February 2, 2007, new charges were sworn against petitioner under the MCA, charging him with

conspiracy and providing material support for terrorism. Pet. App. 32a, 38a-44a.[1]

8. On February 20, 2007, the D.C. Circuit issued its decision in *Boumediene* v. *Bush*, 476 F.3d 981. See Pet. App. 52a-102a. The court held that the MCA applies to the detainees' pending habeas cases—each of which "relates to an 'aspect' of detention and * * * deals with the detention of an 'alien' after September 11, 2001," *id.* at 58a—and thus removes federal court jurisdiction over their petitions, *id.* at 58a-61a. The court explained that Section 7(b) specifies the effective date of Section 7(a), which removes federal jurisdiction over both habeas and all other detention-related claims in "all cases, without exception." *Id.* at 59a.

The court of appeals further held that the MCA is consistent with the Suspension Clause, for two reasons. First, as aliens outside the sovereign territory of the United States, the detainees have no constitutional rights under that clause. Pet. App. 66a (citing, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Second, even if the detainees had constitutional rights under the Suspension Clause, the clause would not protect a right to the writ in these circumstances. As the court explained, "the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 62a, but "the history of the writ in England prior to the founding" shows that "habeas

---

[1] Last month, the military-commission judge dismissed the charges against petitioner without prejudice after determining that the military commission lacked jurisdiction. The judge held that petitioner's CSRT had determined him to be an "enemy combatant," rather than an "unlawful enemy combatant," as required for the military commission's jurisdiction. *United States* v. *Hamdan*, Decision and Order—Motion to Dismiss for Lack of Jurisdiction (Military Comm'n June 4, 2007). The United States has moved for reconsideration of that order.

corpus would not have been available in 1789 to aliens without presence or property within the United States." *Id.* at 64a-65a.

The court further explained that this Court's decision in *Eisentrager* "ends any doubt about the scope of common law habeas." Pet. App. 65a. In *Eisentrager*, this Court stated that it was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right." *Eisentrager*, 339 U.S. at 768.

The court of appeals held that the detainees' reliance on this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), was misplaced. Pet. App. 65a. The court explained that *Rasul* interpreted only the statutory right to habeas, so it "could not possibly have affected the constitutional holding of *Eisentrager*," *id.* at 67a n.10, in which the Court explicitly held that aliens detained outside the sovereign territory of the United States do not have a constitutionally protected right to the writ, see 339 U.S. at 781.

Having concluded that the MCA removes jurisdiction in the detainees' cases, the court vacated the district courts' decisions and dismissed the cases for want of jurisdiction. Pet. App. 71a-72a.

Judge Rogers dissented. She agreed that Congress intended the MCA to withdraw federal jurisdiction over the detainees' claims, but she found the statute to be inconsistent with the Suspension Clause, because "Congress has neither provided an adequate alternative remedy * * * nor invoked the exception to the Clause by

making the required findings to suspend the writ." Pet. App. 73a.

9. On March 5, 2007, the detainees in *Boumediene* and *Al Odah* filed a petition for a writ of certiorari with this Court. A short time earlier, petitioner, joined by one of the detainees in *Boumediene* and *Al Odah*, had filed a petition for a writ of certiorari and a writ of certiorari before judgment. This Court denied certiorari in *Boumediene* and *Al Odah* on April 2, 2007, and denied certiorari in petitioner's case on on April 30, 2007. See *Boumediene* v. *Bush*, 127 S. Ct. 1478; *Hamdan* v. *Gates*, 127 S. Ct. 2133. Petitioner thereafter petitioned the D.C. Circuit to hear his appeal en banc and reverse *Boumediene* or, in the alternative, to summarily affirm the dismissal of his habeas petition pursuant to *Boumediene*. See 07-5042 Petition for Initial Hr'g En Banc (D.C. Cir. filed June 8, 2007). That petition remains pending before the court.

10. The detainees in *Boumediene* and *Al Odah* filed petitions for rehearing of the denial of certiorari. On June 29, 2007, this Court granted those petitions and granted certiorari in *Boumediene* and *Al Odah*. Pet. App. 116a. On July 2, 2007, petitioner filed a motion for leave to file an out-of-time petition for rehearing of the denial of certiorari and a second petition for certiorari before judgment.

ARGUMENT

Petitioner makes the extraordinary request, for the third time in the course of this litigation and the second time this year, that this Court grant a writ of certiorari before judgment. This Court's rules provide that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such im-

perative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Petitioner has not come close to meeting that standard. His original petition, which presented arguments virtually identical to those raised here, was denied three months ago. See *Hamdan* v. *Gates*, 127 S. Ct. 2133 (2007). The only significant development since that time is this Court's decision to grant review in *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196. But the pendency of those cases makes a grant of review in this case even less appropriate. There is no reason to grant petitioner's renewed request now.

1. This Court should decline to consider the merits of this petition and deny it based on its successive nature alone. This is the second time that petitioner has sought certiorari before judgment in the court of appeals in this case. There is no basis for filing a *second* (and duplicative) petition for certiorari before judgment within three months of the Court's denial of a first petition, particularly when the petition is premised on virtually identical grounds. Indeed, it is not even clear that the Court's rules permit the filing of such a duplicative petition for certiorari before judgment. This successive petition seems designed primarily to avoid the time limits on filing a petition for rehearing. In the case of a petition after judgment, such a second petition would be untimely, and a *timely* petition for rehearing would be the only avenue for reconsideration. In light of the substantially higher hurdle to granting certiorari before judgment, it makes no sense to treat the *absence* of a

judgment as a circumstance that puts a petitioner in a more favorable procedural posture.[2]

Petitioner presents no basis for his new, second petition. The only circumstance that has changed since petitioner's first petition is that this Court has granted certiorari in *Boumediene* and *Al Odah*. But, as explained below, that development counsels against, rather than in favor of, granting certiorari and expedition of petitioner's case.

2. Petitioner asserts (Pet. 5-6) that his petition raises issues of "imperative public importance," Sup. Ct. R. 11, namely, "whether the federal courts have any jurisdiction—constitutional or statutory—to consider habeas petitions filed by Guantanamo Bay detainees." But this Court will consider precisely those issues in *Boumediene* and *Al Odah*. See, *e.g.*, 06-1195 Pet. at i, *Boumediene, supra* (describing the question presented as "[w]hether the [MCA] validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay"). There is no need to grant this petition and expedite the case in order to review the same basic issues before the Court in *Boumediene* and *Al Odah*. Contrary to petitioner's assertion (Mot. to Expedite 3-6), there would be no "efficiencies gained" by briefing and considering the same issues pending in *Boumediene* and *Al Odah*. Certainly, duplicating review of the same issues is not "of such imperative public importance as to justify deviation from normal appellate practice," Sup. Ct. R. 11, by granting the petition for a writ of certiorari before judgment.

---

[2] Respondents have filed a separate opposition to petitioner's motion to file an out-of-time petition for rehearing from the denial of his earlier petition for a writ of certiorari before judgment.

Petitioner contends (Pet. 9) that his case is a "necessary counterpart" to this Court's review of *Boumediene* and *Al Odah* because the petitioners in those cases challenge the MCA's elimination of habeas jurisdiction only as it relates to aliens detained as enemy combatants. Petitioner, of course, is detained as an enemy combatant at Guantanamo Bay and is in exactly the same position as the detainees in *Boumediene* and *Al Odah* insofar as he challenges his detention. The fact that he is also subject to trial by military commission does not distinguish his case from those of the detainees in *Boumediene* and *Al Odah*. The jurisdictional provision of the MCA makes no distinction between aliens detained as enemy combatants and those who are also subject to trial by military commission, see MCA § 7(a), 120 Stat. 2636, and petitioner provides no reason why any decision of this Court in *Boumediene* and *Al Odah* would not apply to him. Indeed, in the court of appeals, petitioner has conceded that the issues resolved in *Boumediene* and *Al Odah* will control his case. See 07-5042 Pet. for Initial Hr'g En Banc 6 (arguing that the "question [in *Boumediene*] does not distinguish between those detainees challenging the CSRT process and a detainee challenging the legality of a military commission trial, and is therefore broad enough to cover [petitioner's] claims").

Petitioner suggests (Pet. 6) that review of his case is necessary because otherwise, if this Court were to rule in *Boumediene* and *Al Odah* that aliens detained as enemy combatants have constitutional habeas rights, "the government could immediately charge those individuals before military commissions and escape the ambit of the Court's ruling." That is mistaken. The government has never suggested that the pendency of military-commission charges against a detainee would by itself preclude

him from challenging his enemy-combatant status in a habeas petition. Indeed, petitioner already has such charges pending against him, and the government has never sought dismissal of his habeas case on that basis. If this Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for habeas corpus to challenge their detention notwithstanding the MCA, there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission.

Thus, even though the Court has granted review in *Boumediene* and *Al Odah*, there is no reason for the Court to grant review in this case, which raises the same legal issues, particularly insofar as a grant of certiorari would require the extraordinary step of granting review before judgment. If petitioner wishes to submit his views on the proper resolution of those issues, he may file an *amicus* brief in *Boumediene* and *Al Odah* providing those views.

3. Ordinarily, it would be appropriate for the Court to hold a petition raising the same issues as a case that has already been accepted for review. This petition, however, seeks a writ of certiorari before judgment in the court of appeals. Once this Court decides *Boumediene* and *Al Odah*, the court of appeals will be able to apply this Court's rulings in deciding petitioner's case. Significantly, petitioner does not even allege that any irreparable harm will result as a consequence of waiting to seek certiorari after the court of appeals reviews the district court's dismissal of his habeas petition, or until after this Court reviews *Boumediene* and *Al*

Odah.[3] There is therefore no reason to hold this petition.

4. To the extent this petition seeks to present issues different from those in *Boumediene* and *Al Odah*, those issues are secondary to the threshold issues presented in *Boumediene* and *Al Odah* and do not warrant review.[4] Although the thrust of petitioner's petition is the same questions presented in *Boumediene* and *Al Odah*, see Pet. i, 6, petitioner contends (Pet. 10, 23-28) that his petition also raises important legal issues beyond those presented in the *Boumediene* and *Al Odah* petitions—specifically, the validity of the MCA under separation of powers principles, the Bill of Attainder Clause, and the equal-protection component of the Due Process Clause. The court of appeals in *Boumediene* and *Al Odah*, however, determined that Guantanamo Bay detainees, as aliens detained outside the sovereign terri-

---

[3] As we explained in our opposition to petitioner's earlier petition, the availability of review under the DTA and the MCA means that petitioner would not suffer any harm from delaying consideration of his habeas action until he has completed DTA procedures. See Br. in Opp. at 14-16, *Hamdan* v. *Gates*, 127 S. Ct. 2133 (2007) (No. 06-1169). It follows *a fortiori* that he will not suffer irreparable harm from delaying review until the court of appeals has issued a final judgment.

[4] Petitioner argues (Pet. 21-23) that review under the DTA and MCA is not an adequate substitute for habeas, but his arguments add little to the arguments the Court will consider in *Boumediene* and *Al Odah*. Indeed, petitioner himself considers his arguments to be similar to those asserted by the *Boumediene* and *Al Odah* petitioners. See Pet. 21 ("Just as with the *Boumediene* and *Al Odah* challenges to the CSRT procedures, the Government cannot avoid Petitioner's Suspension Clause argument on the theory that the MCA provides an adequate substitute for habeas challenges to the military commission process."). In any event, those arguments lack merit for the reasons set out in our opposition to petitioner's earlier petition. See Br. in Opp. at 23-26, *Hamdan* v. *Gates*, *supra* (No. 06-1169).

tory of the United States, lack any constitutional rights. Pet. App. 66a. This Court's review of that ruling, therefore, might well resolve the additional constitutional claims asserted by petitioner.

In any event, the "additional" issues asserted are without merit and do not warrant plenary review, much less review before the court of appeals has had an opportunity to consider them. Petitioner argues that the MCA violates separation of powers by preventing the courts from implementing this Court's ruling in *Hamdan* v. *Rumsfeld*, which, in his view, held that the Geneva Conventions are judicially enforceable. Pet. 25-26; see 126 S. Ct. at 2796. But contrary to petitioner's suggestion, *Hamdan* did not hold that the Geneva Conventions are generally judicially enforceable by private parties. On the contrary, the Court explicitly assumed just the opposite. See *Id.* at 2794 ("[A]bsent some other provision of law," the Geneva Conventions do not "furnish[] petitioner with any enforceable right.").

Petitioner's Bill of Attainder argument is similarly baseless. Section 7 of the MCA does not contain either of the required elements of a bill of attainder: it neither singles out petitioner nor imposes punishment. 120 Stat. 2635-2636. The MCA does not apply "either to named individuals or to easily ascertainable members of a group." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946); see *Foretich* v. *United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) ("Both 'specificity' and 'punishment' must be shown before a law is condemned as a bill of attainder."). Rather, Section 7 of the MCA is a jurisdictional provision that applies to an open-ended class of individuals: aliens determined by administrative processes to be enemy combatants or who are being held as enemy combatants while awaiting such determinations.

120 Stat. 2635-2636. Moreover, that provision simply specifies the forum in which permissible claims by enemy combatants must be brought and clarifies the scope of that review. It does not impose any of the types of punishment that this Court has found to be covered by the Bill of Attainder Clause. See *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977).

Even assuming that petitioner has constitutional rights under the Fifth Amendment, his equal-protection claim likewise fails. The MCA does not deprive aliens of any fundamental constitutional habeas right, because even if aliens held outside the United States as enemy combatants have a constitutional right to habeas, the MCA provides adequate and appropriate substitute relief. Further, petitioner is not a member of a suspect class—federal classifications on the basis of alienage are subject only to rational-basis review. See *Matthews* v. *Diaz*, 426 U.S. 67 (1976).

Finally, even if these additional issues warranted this Court's review, this case would be a poor vehicle for considering them. While petitioner did raise these arguments in the district court, the district court had no occasion to consider them, because it found that Section 7(a) of the MCA—the same provision at issue in the *Boumediene* and *Al Odah* decisions—deprived it of jurisdiction. See Pet. App. 15a-16a n.16. And petitioner's appeal has yet to be briefed, much less decided, by the court of appeals. As a result, the issues petitioner seeks to raise here have not previously been addressed by *any* court. They surely would benefit from the normal decisional process that a case undergoes before receiving plenary review by this Court. The Court should not re-

solve those claims in the first instance, but should await a decision by the court of appeals.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied. In the alternative, the petition should be held pending the disposition of *Boumediene* v. *Bush*, No. 06-1195, and *Al Odah* v. *United States*, No. 06-1196, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
ROBERT M. LOEB
CATHERINE Y. HANCOCK
Attorneys

JULY 2007